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COUNTRY REPORT: DENMARK
New Government, New Rules

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Introduction

The general election on 15 September 2011 led to a change in government. A new 'left-wing' minority government came into power consisting of the Social Democrats, the Socialist Party and the Social Liberal Party. The new government replaced the former 'right-wing' minority government after 10 years in power. The new government has declared its intentions to implement a green restructuring process, including a strong focus on renewable energy, climate change adaptation and the chemicals sector. One of the few initiatives presented so far by the new government is an energy strategy.

'Our Energy' - The New Government's Energy Strategy

On 25 November 2011, the new Danish Government published its new plan 'Our Energy'. The main objective is to convert the country to 100 percent renewable energy use by 2050. The strategy presents specific measures for fulfilling the Government's goal of stimulating green growth and is based on the previous government's 'Energy Strategy 2050'. It pushes the pace of developments further. Within the area of increased energy efficiency and savings the focal points are the electricity grid system, existing buildings, 'the public leads the way' and challenging targets with respect to the efficiency of electrical products. Smart grids, intelligent

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networks and electrical cars are essential elements and subsequent strategies are to be proposed. As far as renewables are concerned, wind energy and biomass have the highest priority. Wind generation is to cover 50 percent of electricity use by 2020 and all electricity and heating should be based on renewables by 2035. By 2020, transportation should at least be based upon ten percent bioenergy. Research money will, however, also be devoted to solar, tidal energy and green transport technologies. Moreover, it is proposed to ban the installation of oil fired burners in new and existing buildings as from 2013 and 2015 respectively. The new initiatives are to be financed by consumers through grid tariffs, 'public service obligations' (PSO) and by a new supply security tax.

By 2020, the initiatives are expected to lead to extensive reductions in energy consumption, making it possible for half of the country's electricity consumption to be satisfied by wind power. Coal is to be phased out of Danish power plants by 2030, and by 2035 all electricity and heating will be generated using renewable sources. The long-term goal of the plan is to implement an energy and transport network that relies solely on renewable energy sources. A concurrent goal is to position Denmark as a leader in developing climate-friendly technology.

It is estimated that the new initiatives will have the positive result that Denmark's greenhouse gas emissions will be cut by 35 per cent by 2020, compared with 1990 levels. This would put us well on the way towards meeting the EU's goal of an 80 to 95 per cent reduction by 2050. The strategy will form the basis for inviting the opposition to negotiations to reach a new political agreement that will cover the period till 2020.

New Nature and Environment Appeal Board

As of 1 January 2011, the former Nature Protection Appeal Board and the Environmental Protection Appeal Board were merged into one new administrative appeal board - the Nature and Environment Appeal Board.[1] The new Nature and Environment Appeal Board has been established as a so-called 'combination board' in the sense that the composition of the board may differ from one type of case to another. In essence the new board has two distinct compositions: 1) a lay composition as in the former Nature Protection Appeal Board and 2) an expert

[1] Act No. 483/2010.

composition almost equal to the former Environment Protection Appeal Board. It is possible that in special cases the two board compositions may join into one combined board. It is also possible that an appeal case in special circumstances may be transferred from the lay board to the expert board and vice versa.

The lay board consists of a chairman (permanent staff qualified as judge), two Supreme Court judges and seven members appointed by Parliament. The expert board consists of a chairman and a number of experts - normally two or four. The experts are for each appeal case selected from a list of experts appointed by the Minister for the Environment on the basis of nominations from a number of environmental and business organisations. The former Environmental Protection Appeal Board operated with two lists of experts based on nomination by environmental organisations on the one hand and business organisations on the other, ensuring an equal representation. This mechanism has been abandoned in the new board. The lay board mainly deals with appeals related to planning and nature protection, while the expert board mainly deals with appeals related to pollution and chemicals. The board has a fairly wide discretion to delegate decision-making to the chairman. While the real changes regarding the powers and the functioning of the board have been limited, there may be some advantages regarding flexibility to combine appeals under different pieces of legislation in one procedure. Furthermore, it appears that the new board has made an effort to ensure a more efficient process.

Recent Statutory Developments

New Rules for Exploitation of Geothermal Energy - Amendments to the Subsoil Act

The *Subsoil Act*[2] has been amended by Act No. 541 of 30 June 2011, to introduce a new Chapter (4a) on the granting of licences for exploration for and production of geothermal energy. In Denmark, there is considerable potential for extracting geothermal heat. Three licences have been granted and more applications received. To a great extent the new regulatory framework for geothermal energy matches the licensing system for exploitation of oil and natural gas. Companies are required to have a licence to initiate activities. Licences are granted within a defined area through licensing rounds for a 6-year exploration period and 30 years' production

[2] Act No. 293 of 10 June 1981 as later revised by the *Consolidated Act* No. 960 of 13 September 2011 on the Use of the Danish Subsoil.

period. The selection criteria relate to the applicants' expertise and financial capacity and the proposed work programme for exploration or production activities. An optional selection parameter is based on the amount that applicants are prepared to pay for a licence. Consideration of any lack of efficiency or non-compliance with obligations under previous licences may be included in the evaluation.

Amendments include options for prioritizing the use of the subsoil[3] and principles for third party access to existing infrastructure.[4] The *Subsoil Act* lays down the basic framework for oil and gas exploration and production in the Danish subsoil and on the Danish continental shelf. Today, the Act has particular relevance for exploitation of oil and gas, salt and geothermal energy, transportation by pipeline and the storage of natural gas or CO_2 and the required licences and public supervision in this connection. The Act has previously implemented Directive 94/22 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, parts of *EU Directive* 85/337 as amended on assessments of the environmental consequences, parts of *EU Directive* 2009/147 on the conservation of wild birds, parts of *EU Directive* 92/43 on the conservation of natural habitats and of wild fauna and flora.

Geological Storage of CO_2 - Amendments to the Subsoil Act

The potential for reducing CO_2 emissions by capturing and storing CO_2 from major point sources such as power stations has led to adoption of new rules at the European level and in Denmark. The *Subsoil Act* has been amended by Act No. 541 of 30 June 2011 to implement the *EU Directive* 2009/31/EC on geological storage of carbon dioxide that enables, but does not require Member States to establish CO_2 storage sites. The Minister for Climate, Energy and Buildings may grant an exclusive licence for exploration and use for storage purposes for a defined area and within specific time limits. A geological formation in the subsoil shall only be selected as a CO_2 storage site, if there is no significant risk of leakage, and if no significant environmental or health risks exist. A CO_2 stream shall consist overwhelmingly of carbon dioxide, and no waste or other matters may be added for the purpose of disposal. The licensee shall establish and maintain a register of the quantities and

[3] Section 5.
[4] Section 16.

composition of CO_2 delivered and injected, and set up a programme for monitoring the facilities before the injection of CO_2 is initiated.

The closure of a CO_2 storage site is subject to ministerial approval, and the licensee shall draw up and comply with a post-closure plan. Legal obligations relating to the storage site may be transferred to the Minister provided that all available evidence indicates that the stored CO_2 will be completely and permanently contained; that at least 20 years have passed after the closure; that an amount to cover the expected monitoring costs for a period of 30 years will be paid; and that the CO_2 storage site has been sealed and the injection facilities have been removed. The licensee shall provide financial security for the estimated costs of all obligations connected to the CO_2 storage license. Potential users are entitled to use CO_2 transport networks and CO_2 storage sites against payment if there is the necessary capacity. The establishment and operation of pipeline facilities for transporting and storing CO_2 may only take place pursuant to a licence, subject to conditions regarding routing, dimensions, ownership and payment for use. The more technical aspects of the Directive are implemented in an executive order.

The amendments do not involve any decision on the use of CO_2 storage in Denmark. The current Danish policy is to await results from several European pilot projects on CO_2 storage. However, more interest is devoted to the possibility of injecting the CO_2 into the oil fields as this has the added benefit of enabling more oil to be produced. This method is not yet being used in the oil fields of the North Sea, primarily because the method is considered to be very expensive.

Waste Sector Reform

Since 2002, the Danish Government has been working on a major reform of the waste sector. The aim has been to make an administrative reform of the waste sector to make it more efficient, and to liberalise the handling of specific categories of waste. The reform has been divided into three main phases. The first phase included the liberalisation of source-separated waste for recovery from businesses and the introduction of more uniform procedures in the municipal handling of waste, ensuring more transparency and less administrative burdens for the waste producers and handlers. The first phase will be completed by the end of 2011. The second phase will commence in 2012 and concerns the waste incineration sector. This implies that

a decision will be made as regards how far the liberalisation of waste for energy recovery should go. Today, waste handlers are free to export waste from businesses for energy recovery, whereas the waste market within Denmark has not been liberalized and is still subject to a municipal control of waste streams. The third phase concerns the administration of waste for disposal and the organisation of waste disposal facilities.

A major legislation package implementing the first phase of the waste reform entered into force in January 2010. However, it turned out to be rather problematic to implement the reform initiatives due to difficulties in administering the adopted schemes and launching the new centralized electronic procedures. The legislative package implementing the first phase of the reform has thus been subject to several adjustments, but will be completed with the latest adjustments of the charges for handling business waste at the municipal recycling depots. The latest adjustments will enter into force from 1 January 2012.

With the completion of the first part of the waste reform program, source-separated waste for recovery from businesses has been liberalized and businesses can freely export business waste for energy recovery to facilities outside Denmark. This implies on the one hand that the municipalities are no longer allowed to collect waste for recovery from businesses, except from what is voluntarily handed in at the municipal recycling depots. On the other hand the municipalities still have an obligation to handle all waste for energy recovery, also waste from businesses, unless a company chooses to export this for energy recovery. Phase two of the waste reform will continue in 2012 based on a Government Official Report published in December 2010, which so far has been the only government initiative to commence the debate on the liberalisation of waste for energy recovery.

Recent Case Law

Wind Turbines – The Østerild Case

A controversial case in Denmark has been the establishment of a national testing station for large-scale wind turbines – the Østerild case. The establishment of the testing station has been specified in Act of Parliament.[5] According to the Act, it is

[5] Act No. 647/2010.

possible to erect seven wind turbines of up to 250 m total height. The Østerild area is a primarily state-owned forest area. According to the Act, clear cutting of up to 550 ha of forest is possible. Some of the forest land will be replaced by wetlands and other nature restoration initiatives. There has been a substantial local opposition to the testing station due to negative effects on neighbouring properties and objections to the necessary expropriation of private property. In addition, the clear cutting of forest together with the potential negative effects on nearby Natura 2000-areas (bird protection and habitat areas designated according to the EU Birds Directive and Habitats Directive) has been controversial. A complaint was lodged in August 2010 to the EU Commission by the Danish Nature Conservancy Organisation on the basis that the environmental impact assessment and the habitat assessment are insufficient. Furthermore, an appeal has been lodged before the Danish courts (the Western High Court) by an organisation (Organisation for a Better Environment) on its own and on behalf of a number of neighbours questioning the validity of the Act and the lawfulness of the planned expropriations. The Western High Court has, in a ruling of 29 August 2011, accepted the right of appeal of the organisation in relation to the claim regarding the validity of Act and also the right of appeal of the affected neighbours in relation to the expropriations. However, the Western High Court has denied the granting of interim relief or injunction, even though the Court recognised that it could not be excluded that the environmental assessments prior to the adoption of the Act did not fulfil the requirements of the Habitats Directive. A ruling on the merits of the case is pending.